

CORONAVIRUS AND GERMAN RENEWABLE ENERGY PROJECTS: SOME SPECIFIC REGULATORY TOPICS

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The coronavirus pandemic is currently turning the entire world upside down and each and every market is experiencing its impact. The German electricity market is no exception. Other issues caused by the spread of the coronavirus may also affect German renewables projects, such as delays in permitting and tender proceedings, and limitations on the free movement of persons. In this briefing, we explore the following topics: (1) the effects of falling market prices under direct marketing agreements and PPAs; (2) tender proceedings at the Federal Network Agency; and (3) free movement of technical staff.

For a more general overview of key potential practical and legal considerations facing developers and sponsors across the lifecycle of European renewable power projects, please see our briefing “Renewables in the Time of Coronavirus”.

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EFFECTS OF FALLING MARKET PRICES UNDER DIRECT MARKETING AGREEMENTS AND PPAS

Since the beginning of the outbreak in Germany at the end of February 2020, the market price for electricity has taken a deep dive. This holds true for future markets as well as spot market prices. The reasons are rather easy to explain – more and more major production facilities are limiting or even stopping production. As a result, the demand for electricity falls. On the other hand, renewable (and conventional) energy production facilities still produce and feed electricity into the grid, and consequently, prices for electricity are dropping. Moreover, since it is currently unclear when electricity demand will return to pre-coronavirus levels, the price drop affects future markets as well as spot markets.

For many renewable energy plants in the direct marketing regime, a mere price drop will leave their income level unaffected, because the market premium payable by the grid operator covers the difference between the market price and the applicable value applying to the relevant plant. However, with average market prices at a low level, there may be an increased risk of negative prices occurring on the spot market for more than six consecutive hours. This will trigger the provision in section 51 EEG 2017 according to which the applicable value will be reduced to zero during said time period (meaning the plant operator will not receive a market premium from the grid operator for the electricity produced). Under some direct marketing agreements, the offtaker would still have to pay during such negative pricing periods, because the payment obligation is usually and most commonly based on the monthly average spot market price. However, many recent direct marketing agreements (in particular in the offshore wind sector) contain provisions according to which the direct marketing offtaker will be relieved from its payment obligations in times where section 51 EEG applies (leaving the plant operator with no income at all during these times).

Power Purchase Agreements (“PPAs”) are still rather new to the German electricity market. While corporate PPAs (where a corporate entity acts as offtaker to cover its own electricity needs) have received the most media coverage, the most common PPA in Germany currently is the utility PPA (concluded between a plant operator and a utility acting as offtaker). At least the utility PPAs mostly provide for a fixed price which is payable for every kWh produced. If electricity prices remain at the current low level, or drop even further, this could be problematic for offtakers (despite the fact they will still receive certificates of origin).

As a result, and depending on how the situation develops, offtakers under direct marketing agreements and PPAs may consider renegotiating pricing provisions given the impact of the coronavirus on electricity prices. Most direct marketing contracts and PPAs contain a specific clause dealing with extraordinary circumstances which may affect the economic balance of the contract (*Wirtschaftlichkeitsklauseln*). In addition, the regulations on disruption of the basis of a contract (*Störung der Geschäftsgrundlage*) (§ 313 BGB) may also apply, which either allows for an adjustment of the contract or a withdrawal from it.

As previously mentioned in our article on the duties of directors and board members during the coronavirus pandemic, it is likely (though not yet clear) that clauses relating to the economic balance of a contract or the legal provisions on disruption of the basis of a contract will apply for the most part. Operators of renewable energy plants should therefore closely follow the market and prepare for negotiations with their offtakers.

TENDER PROCEEDINGS OF THE FEDERAL NETWORK AGENCY

The German Federal Network Agency (*Bundesnetzagentur*, “BNetzA”) has taken action to avoid the coronavirus impacting on tender procedures set forth by the Renewable Energy Act (*Erneuerbare-Energien-Gesetz*, “EEG”), while also protecting bidders who may face difficulties regarding the construction of their projects in the current situation.

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Under the EEG, developers of most renewable energy plants (biomass, offshore and onshore wind, and solar) are obliged to take part in public tender procedures if they wish to benefit from the grid operator's market premium payments. The dates for the tender procedures are pre-set by the EEG and the BNetzA is obliged to publish certain information on its website for each conducted tender procedure (names of the awarded bidders, location of awarded plant, the lowest and highest bid which have been awarded, and the average weighted bid value). Once the information is published on the BNetzA's website, the time period for the construction of the plant in question begins (the construction deadline). The specified period is statutorily set by the EEG for each type of renewable energy source. In cases where the deadline is not met, the plant operator is obliged to pay a penalty. This penalty payment is covered by a security which has to be presented to the BNetzA prior to the tender procedure. In the worst case, missing the construction deadlines will ultimately lead to the loss of the award.

The coronavirus pandemic now jeopardises the meeting of these deadlines, especially due to the disruption of supply chains. Questions have been asked in the market how these procedures will be dealt with for the foreseeable future. To address these concerns, the BNetzA published information on its website on how it will deal with delays which are caused by the coronavirus pandemic.

Future tender procedures

The BNetzA clarified that tender procedures will take place at the agreed set dates. The BNetzA will open, review and rank the bids as per the law. It also announced however that these procedures will probably be delayed, because many persons are involved and face-to-face meetings are required.

The BNetzA also announced it will inform bidders but refrain from publishing award decisions on its website for the time being. Thus, the legal event triggering the commencement of deadlines will not take place and – as a result – the clock will not start for the construction deadline. The BNetzA made it clear that it will only restart the public announcements of award decisions once the situation has stabilised but – understandably – gave no further details on when this would be. A notable exemption applies to operational biomass plants which have received an award (*bezuschlagte Biomasse-Bestandsanlagen*) as well as for any other bidder who requests the publication of their award.

In order to comply with legal transparency requirements, the BNetzA will nevertheless publish certain information on the conducted tender procedures, such as the quantity of bids, and the highest and lowest bid value of successful bids.

Projects having already received an award

Finally, the BNetzA announced that it will grant extensions to construction deadlines for onshore wind energy and biomass plants. Operators may apply for such an extension quite informally: an e-mail outlining the reasons for the delay will be sufficient. In this regard, the BNetzA also clarified that in such cases it will refrain from notifying the relevant TSO of any delays beyond the original deadline. Penalties which would normally be imposed by the relevant TSO even if a deadline was extended will, therefore, not be imposed.

Until further notice, operators of solar plants may request the remuneration confirmation (*Zahlungsberechtigung*) prior to the commissioning of the plant, provided that the plant is registered in the market data registry. In that way, an expiry of the award can be avoided. The operator must outline the reasons for the delay in the application.

For combined heat and power plants, which have longer construction deadlines, the BNetzA currently does not see a need for any special rules or exemptions. It will, however, continue to monitor the situation.

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FREE MOVEMENT OF TECHNICAL STAFF

The rules on free movement currently differ between Germany's federal states. A number of them have ordered people to stay at home. However, leaving for work is still permitted. A number of federal states have also imposed travel restrictions. Some of these rules are worded more strictly than others, such as in Mecklenburg-West Pomerania where, in principle, only persons who live in that state are now permitted to enter or remain there. These rules do, however, contain an exception for persons who work in the relevant state. Accordingly, technical staff may still enter for the service and maintenance of renewable energy plants, and construction work by companies from outside the relevant state are still possible, as long as the applicable social distancing rules are respected.

Anyone travelling should check the applicable local requirements. It may be mandatory to have an ID card or other identification document as well as evidence of address of residency; an employer letter may also be required. Obviously, these rules may change quickly.

The question remains what will happen should a general curfew be ordered. In such case, we would expect that exceptions would be foreseen for staff essential to maintaining and delivering a safe energy supply. This should include technical managers as well as service providers for the repair and maintenance of renewable energy plants. For the onshore wind sector, for example, the German Wind Energy Association (*BWE*) has already informed the federal states of the requirements for the continued and safe operation of wind farms.

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